Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 74-1374

CHARLES J. PILUSO, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner prays that this Court grant a rehearing in the above-entitled matter. This Court denied certiorari on October 6, 1975. Justice Douglas dissented and stated that certiorari should be granted.

QUESTION PRESENTED

DOES NOT THE DENIAL OF CERTIORARI BY THIS COURT, JUSTICE DOUGLAS DISSENTING, TO THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, LEAVE UNDISTURBED A RULING THAT EXPANDS THE FEDERAL JURISDICTION UNDER THE TRAVEL ACT TO INCLUDE ALL OF THE COMMERCIAL BRIBERY STATUTES IN THE SEVERAL STATES AND VIRTUALLY ALL OF THE CONFLICT OF INTEREST STATUTES ENACTED THROUGHOUT THE

SEVERAL STATES IN VIOLATION OF THIS COURT'S WARNING IN REWIS V. UNITED STATES, 401 U.S. 808, 91 S.Ct. 1056 (1971).

STATEMENT OF THE CASE

The Petitioner, an attorney at law, was tried in a three-count indictment alleging conspiracy and substantive violations of the Travel Act, Title 18, Section 1952 USC. The unlawful activities alleged in the indictment as the predicate for the invocation of the Travel Act were the conflict of interest statute, Title 18, Section 215 USC, and the commercial bribery statute of the State of New York, Section 180 of the New York Penal Code. Two United States District Court Judges in Alexandria, Virginia, came to different conclusions as to whether either or both of these statutes could be validly alleged as the unlawful activity to invoke the jurisdiction of the Travel Act. See *Piluso* v. *United States,* No. 74-1374, and *Louis Pomponio* v. *United States,* No. 74-1260. See Pomponio Appendix 9A. The United States Court of Appeals for the Fourth Circuit rendered an opinion on February 7, 1975, which reversed the dismissal of the indictment ordered by Judge Bryan in *Louis Pomponio* v. *United States,* 74-1260, in this Court and affirmed the contrary decision of the judge in the instant case who held that Section 215 of Title 18 and Section 180 of the New York Penal Code constituted unlawful activities which properly invoked the jurisdiction of the Federal Travel Act, Title 18, Section 1952 USC.

Petition for certiorari was denied by this Court on October 6, 1975, with Mr. Justice Douglas dissenting. stating that he would grant certiorari.

ARGUMENT

I. This Court Should Reconsider Its Denial of Certiorari Since the Ruling of the United States Court of Appeals for the Fourth Circuit Has Created an Expansive Extension of Federal Jurisdiction Which Transforms Countless Conflict of Interest Statutes and Commercial Bribery Statutes of All Types Throughout the Fifty States into Federal Felonies under the Travel Act.

The scope and impact of the opinion by the United States Court of Appeals for the Fourth Circuit should prompt this Court to reconsider its denial of certiorari and to join with Mr. Justice Douglas in granting certiorari, not because of the injustice done to the Petitioner in the instant case, *but because of the resultant invidious expansion of Federal jurisdiction that the opinion of the United States Court of Appeals for the Fourth Circuit has spawned.*

In *Rewis* v. *United States,* 401 U.S. 808, 91 S.Ct. 1056 (1971), this Court warned of the impact on the several States that would result from an overexpansive interpretation of the Travel Act. This Court stated:

> "In such a context, Congress would certainly recognize that *an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources and might well produce situations* in which the geographic origin of customers, a matter of happenstance, *would transform relatively minor state offenses into federal felonies.*" See also *Erlenbaugh* v. *United States,* 409 U.S. 239, 93 S.Ct. 477 (1972).

The Court of Appeals, by its reversal of the arrest of judgment rendered by Judge Bryan in *Louis Pomponio* v. *United States,* 74-1260, and its refusal to follow the decision of the Southern District of New York in *United States* v. *Niedelman,* 356 F.Supp. 979 (1973),

has transformed the Travel Act into a Federal "umbrella," which, unless reviewed by this Court, authorizes and creates a mischievous precedent that will allow the Government to bring indictments under the Travel Act for a large number of conflict of interest statutes and all commercial bribery statutes enacted throughout the several States. The decision has also created the incongruous result of changing countless misdemeanor statutes enacted against commercial bribery and conflict of interest abuses into Federal felonies. It has also transformed Federal misdemeanors, such as Title 18, Section 215, into a Federal felony, thereby disrupting sentencing limits enacted by Congress.

As was pointed out in the main Petition for Certiorari, Title 18, Section 215 USC, was, by its legislative history, a conflict of interest statute and not a bribery statute. It was a Federal misdemeanor that imposed a penalty on a bank officer who received a gratuity, commission, discount, etc., in connection with his employment at a federally-insured bank. The statute did not make the giver of the money, gratuity or other form of consideration guilty of any crime. Its thrust was directed toward a bank officer who received benefits "by reason of his peculiar position of * * * influence or trust exacts from another." *Rayette* v. *United States,* 199 F.2d 48 (6 Cir.), *cert. denied,* 344 U.S. 904 (1952).

There are numerous conflict of interest statutes throughout the fifty States which are similar to Title 18, Section 215 USC. A sampling of these statutes are cited in the footnote below, which proscribe a punishment to the receiver only when the receiver exacts a commission, gratuity or bonus in connection with a

work function. We have also cited in the footnote a sampling of the commercial bribery statutes and bribery statutes with respect to athletes, all of which are now a basis for the invocation of the Federal Travel Act by virtue of the decision in the instant case.[1]

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[1] *Conflict of Interest Statutes*
Title 18, § 215, United States Code
Arizona Revised Statutes: Title 45 § 942
California Revised Statutes: 1090
Colorado Revised Statutes: 11-20—101; 11-20—110
Florida Revised Statutes: 944.38; 839.08; 839.09; 839.091; 839.10; 337.04; 337.12; 340.26
Illinois Revised Statutes: Title 102 § 4.1, 4.2
Maine Revised Laws: Title 17 § 3104
Massachusetts General Laws Chapt. 268 § 10

Commercial Bribery Statutes
New York Penal Code: § 180
Arizona Revised Statutes Ann.: § 4-243; § 13-291
California Penal Code § 641
Connecticut General Revised Statutes: § 53-266; § 20-231
Indiana Ann. Statutes: § 10-605
Kentucky Revised Statutes: § 244.600
Louisiana Revised Statutes: § 14:73
Maine Revised Statutes Ann. ch. 136, § 17
Massachusetts Ann. Laws ch. 271, § 39
Michigan Statutes Ann. § 28.320
Montana Revised Codes Ann. § 94-35-221
Nebraska Revised Statutes: § 28-710
Nevada Revised Statutes: § 614.140; § 707.120
New Jersey Revised Statutes: § 2A:9-1, 93-8, 93-9, 32:23-21
North Carolina General Statutes: § 14-353
Oregon Revised Statutes: § 165:515
Pennsylvania Statutes Ann. tit. 18 § 4667
Rhode Island General Laws Ann. § 11-7-3
South Carolina Code: § 16-570
Tennessee Code Ann. § 39-821
Texas Penal Code art. 667-24
Utah Code Ann. § 7648-12
Virginia Code Ann. § 18-336
Washington Revised Code: § 49.44.020; § 49.44.060; § 78.34.210
Wisconsin Statutes Ann. §§ 134.05-06

(Continued on next page)

Typical of the sampling of the conflict of interest laws throughout the several States, which have now, ipso factor, become Federal felonies when combined with the Travel Act, are the statutes of Massachusetts and Arizona. In Massachusetts General Laws, Chapter 268, Section 10 reads:

> A member of the general court or executive council or of a state department or commission who is personally interested directly or indirectly in a contract made by the general court or by either branch thereof or by such department or commission or by its authority in which the Commonwealth is an interested party or a person so interested, who alone or with others represents the Commonwealth making such contract or such member or person who receives a commission, discount, bonus, present or reward from a person or persons making or performing such contract * * * shall be punished * * *

Athletic Corruption Statutes

Arizona Revised States Ann. §§ 5-115, -205
Arkansas Statutes: § 41-903
California Penal Code: § 337b
Colorado Revised Statutes Ann. § 40-12-2
Connecticut General Statutes Revised: § 53-287
Delaware Code Ann. tit. 28 §§ 704, 709
Florida Statutes Ann. § 838.12
Hawaii Revised Laws § 265-7
Illinois Statutes Ann. ch. 38 § 83a (Smith-Hurd Supp. 1959)
Indiana Ann. Statutes: § 10-606
Iowa Code Ann. § 739.12
Kentucky Revised Statutes: § 436.505
Maryland Ann. Code art. 27, § 24
Massachusetts Ann. Laws ch. 271 § 39A
Michigan Statutes Ann. § 28.319
Minnesota Statutes Ann. § 613.251
Mississippi Code Ann. § 2034.5

The Arizona revised statute, Title 45, Section 942, Interest of Officer in Contracts Prohibited—Penalty, reads:

> A. A director or any officer named in this chapter shall not in any manner be interested directly or indirectly in any contract awarded or to be awarded by the board or in the profits to be derived therefrom.
>
> B. An officer who violates this section is guilty of a misdemeanor or punishable by a fine not exceeding $500.00, by imprisonment in the county jail not exceeding six months, or both * * *

The decision below is certainly in conflict with the thrust of the United States Court of Appeals for the Second Circuit, speaking through Judge Friendly, in *United States* v. *Archer,* 486 F.2d 670 (1973). In that opinion Judge Friendly emphasized the dangers this court has spoken about in connection with an over-expansive interpretation of Federal jurisdiction under the Travel Act. Judge Friendly, in retracing the legislative history of the Act, referred to the Bill introduced by the Attorney General in the following terms:

> Yet the Bill he submitted, if read literally, would cover a $10.00 payment to fix a traffic ticket if only the person desiring the fix walked across a state line to pay off the policeman.

In another portion of the opinion, Judge Friendly stated:

> Today there is widespread concern whether the federal criminal law has not outrun reasonable bounds; *"federal auxiliary criminal jurisdiction" has spread to the point where "[t]here is practically no offense within the purview of local law that does not become a Federal crime if some dis-*

> *tinctive Federal involvement happens to be present.''* See N. Abrams, Consultant's Report on jurisdiction, 1 Working Papers of the National Commission on Reform of Federal Criminal Laws, 33, 36 (1970).

In a later portion in the opinion the Court stated:

> While the precise holding of Rewis was that the proprietors of a Florida gambling establishment did not violate the Travel Act merely because some of their customers came from Georgia, *a course of action forseeable and even designed, the opinion indicates that the Act is not to be stretched to the limits of its language.*

The effect of the opinion of the United States Court of Appeals for the Fourth Circuit herein is to extend in blanket fashion the jurisdiction of the Federal Travel Act over all State statutes which have made commercial bribery a crime and all State statutes which have made certain conflict of interest situations criminal and whose language is similar in content to Title 18, Section 201 USC.

This Court, in particular the members who did not join with Mr. Justice Douglas, should reconsider whether the Petition in this case should be granted because it is not confined simply to the conflict in interpretation over whether Sec. 180 Penal Code of New York and Title 18, Sec. 215 USC could invoke the jurisdiction of the Travel Act that was manifest in the conflicting opinions of the Federal District Judges in Virginia and New York but *because the opinion of the United States Court of Appeals for the Fourth Circuit has so expanded that Federal jurisdiction to such a*

myriad of State statutes, substantially effecting federal state relations referred to in Rewis v. *United States, supra.*

We ask this Court to reconsider its denial of certiorari and to grant rehearing. We ask this not primarily because of any injustice that has befallen the Petitioner but because, in the larger sense, the confusion and conflict which exists among the District Courts in two jurisdictions with respect to whether commercial bribery may serve as a fulcrum for the invocation of the Travel Act, and because the opinion of the United States Court of Appeals for the Fourth Circuit has now extended Federal jurisdiction under the Travel Act for the first time to a myriad of conflict of interest statutes throughout the several States. This opinion has blanketed Federal jurisdiction to hundreds of statutes throughout the country in the various States, a result directly opposed to the teaching of this Court in *Rewis* v. *United States, supra.* The fear expressed by Judge Friendly that the Travel Act, if carried to its broadest interpretation, would apply to the citizen who crosses a State line to fix a traffic ticket, is realized by this opinion, and every official denominated in the various State statutes, albeit conflict of interest or commercial bribery, is included under the Federal Travel Act by the opinion of the Court below. This Court should grant rehearing to the Petitioner in light of the overriding issue of Federal expansion and interference with State criminal procedures that this opinion has subsumed and endorsed.

II. Should This Court Decide Not To Resolve the Issue Presented in This Petition for Rehearing, Specifically the Massive Enlargement of Federal Jurisdiction Discussed in Point I Above, This Court Should Nonetheless Grant Rehearing and Summarily Reverse and Order a New Trial Unless This Court Concludes That Both Title 18, Section 215, USC, and Section 180 of the New York Penal Code Constitute Unlawful Activities Within the Meaning of the Travel Act.

If this Court does not feel the time is ripe to review the basic point raised in the Petition for Certiorari and in the Petition for Rehearing, the Court should nonetheless grant rehearing and summarily reverse and order a new trial for the Petitioner unless the Court independently finds that both Section 180 of the New York Penal Code and Section 215 of Title 18, USC, constitute unlawful activity which independently would invoke the Federal jurisdiction of the Travel Act. If one of the acts is deficient a new trial for the Petitioner would be required because of the trial jury's instructions.

The trial judge instructed the jury in the conjunctive on both statutes and thus there is no way that an appellate court can determine on what basis the jury returned its verdict. The trial judge stated to the jury:

> As I have told you, because in these two counts you must find that the crime was committed, that is again the crime in the travel in interstate commerce in furtherance of the bribery, the prohibited unlawful activity, one or the other, either in violation of the state law that I have read you as defined there or in violation of the federal banking law. (Tr. 1220)

Thereafter the Court stated (Tr. 1229):

> It is intent to promote or facilitate all the other words I used in connection therewith, the prohibited unlawful activity as set forth in that statute.
>
> Those two unlawful activities set forth are the bribery of Mr. Zneimer as that word used in the two statutes, the banking statute that I read you and that state statute.

This Court stated in *Leary* v. *United States,* 393 U.S. 631, 89 S.Ct. 532:

> It has long been settled that when a case is submitted to a jury on alternative theories the unconstitutionality of any of the theories requires the conviction be set aside. See Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532. See also, Mills v. United States, 164 U.S. 644, 17 S.Ct. 210; Nicola v. United States, 72 F.2d 787 (3rd Cir. 1934); Yates v. United States, 354 U.S. 298, 312 (1957), and United States v. Johns, 444 F.2d 58.

The present case represents the first appellate holding that Title 18, USC Section 215 of the United States Code, a conflict of interest statute, constitutes unlawful activity within the meaning of the Travel Act. Such a holding results in an impermissible conflict with respect to the legislative intent of Congress which designated Title 18, Section 215 USC as a misdemeanor, with a maximum punishment of $5,000 and imprisonment of not more than one year. By the simple expedient of tying together the Travel Act with this Federal misdemeanor, the Petitioner in this case has been sentenced as a felon under Federal law. The trial judge also submitted Section 182 of the New York Penal Code charging commercial bribery as a basis for convicting Petitioner under the Travel Act.

The submission by the trial judge of both theories to the jury as a basis for sustaining a conviction against the Petitioner, coupled with what is conceded by the Government to be an erroneous instruction by the trial judge to the jury, on the very charge that Petitioner was being tried for, should form an independent basis for this Court to grant rehearing and to summarily order a new trial as to the Petitioner, Piluso. See Tr. 1208, Petitioner's Appendix 27A, Petitioner's Petition for Certiorari, page 25, Government Opposition to Petition for Certiorari, page 10.

CONCLUSION

In view of the foregoing we pray that this Court grant the Petition for Rehearing.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

I, Albert J. Ahern, Jr., being a member of the Bar, do hereby certify that the above Petition for Rehearing is filed in good faith and raises an issue that counsel does not feel has been gleaned from the original petition, and not for the purposes of delay.

ALBERT J. AHERN, JR.